BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

GAIGE ADKINS Claimant	)	
V.	)	
CENTURION INDUSTRIES, INC. Respondent	)	CS-00-0270-700 AP-00-0450-066
AND	)	
ZURICH AMERICAN INS. CO. Insurance Carrier	)	
AND	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the March 18, 2020, Award entered by Administrative Law Judge (ALJ) Steven M. Roth. The Board heard oral argument on June 25, 2020. Terry Torline appeared for Claimant. Meredith Moser appeared for Respondent and its insurance carrier (Respondent). Matthew Bergmann appeared for Kansas Workers Compensation Fund (Fund).

The ALJ found Claimant was an employee of Respondent at the time of the accident, and temporary total disability benefits (TTD) were not overpaid.[1] The ALJ also found Respondent had actual notice of Claimant's accident. The ALJ determined, however, Claimant's claim is barred by K.S.A. 44-508(3)(B), the "going and coming rule." The ALJ also determined if the going and coming rule did not apply, Claimant's claim is barred because his deviation was so substantial he abandoned any business purposes.

[1] The ALJ noted should this claim ultimately be found compensable, any TTD paid after April 24, 2019, is an overpayment. The ALJ found it is more probable than not Claimant was at maximum medical improvement on April 24, 2019.

Additionally, the ALJ barred Claimant's claim based on the alcohol defense contained in K.S.A. 44-501. In so doing, he concluded the results of Claimant's alcohol blood test are admissible, and Claimant failed to overcome the presumption of contribution pursuant to K.S.A. 44-501(b)(1)(D). The ALJ assessed penalties in the amount of $25 against Respondent.

The Board considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant argues he was on a special purpose trip, without deviation, for Respondent on January 16, 2018. Claimant argues his blood test results are inadmissible because his test results were obtained in violation of constitutional/statutory provisions, and because Respondent failed to meet foundation requirements. As a result, Claimant contends there is no statutory presumption he was impaired at the time of the accident. Further, Claimant argues Respondent failed to timely pay his medical bills as ordered by the court, automatically giving rise to penalties.

Respondent maintains the ALJ's Award should be affirmed. Additionally, Respondent argues Claimant did not provide timely notice of his accident, and penalties are not warranted.

The Fund raised no specific issues prior to the ALJ's Award. The Fund reserves any rights it may have under the Kansas Workers Compensation Act (Act) to address issues which may come from the Board's decision.

The issues for the Board's review are:

1. Did Claimant give timely notice pursuant to K.S.A. 44-520?

2. Did Claimant's injuries arise out of and in the course of his employment?

3. Are the results of Claimant's blood alcohol test admissible?

4. Did the ALJ err in denying benefits pursuant to K.S.A. 44-501(b)(1)?

5. Was there an overpayment of TTD after April 24, 2019?

6. Are penalties owed for Respondent's failure to timely pay medical bills?

7. Is the use of the AMA *Guides*[2] constitutional?

FINDINGS OF FACT

Claimant was hired by Respondent as a travel millwright laborer in July 2016. Claimant, a resident of Neodesha, Kansas, traveled to job locations as provided by Respondent. Claimant testified he drove his personal vehicle and drove directly to the job sites without going to Respondent's Fredonia office beforehand. Claimant was paid per diem and mileage dependent on the distance of the job locations from his residence. Respondent also paid for lodging and other travel expenses if the job site was not within commuting distance. Claimant's work required him to travel to Respondent's Fredonia office regularly. Claimant was not paid mileage for reporting to the Fredonia office. Claimant supplemented his income with unemployment benefits between jobs with Respondent.

Claimant was drawing unemployment in the winter of 2018 following the completion of a job. Respondent informed Claimant of a new assignment in Humboldt, Kansas, which required him to complete specific training prior to the start of the job on January 26, 2018. Claimant traveled to Respondent's office in Fredonia, approximately 13.2 miles from his residence, on the morning of January 16, 2018, for said training.

Claimant completed six hours of training at Respondent's office. He was paid for his attendance. He was not paid mileage. It is unclear exactly what time Claimant completed training, but after he left Respondent's office he made two stops before heading home. Claimant first went to a hardware store for a short duration. Claimant then traveled to the Fredonia golf course clubhouse to watch sports on television. Claimant could not recall if he consumed alcohol while at the clubhouse.

Claimant testified the weather was cold on January 16, 2018, and the roads had small amounts of snow and ice. Claimant stated he was driving his personal vehicle, a Toyota truck, with unopened beer cans in the cab when he left the clubhouse. He could not recall whether he was wearing his seat belt. Claimant suffered a rollover motor vehicle accident on his way home. Claimant was ejected from his vehicle and sustained substantial injuries, most notably to his back, hips, and urethra.

Witnesses living near the accident scene called for emergency help. John Cunningham, at the time a deputy sheriff for Wilson County, testified he arrived on the scene shortly after he received a call from dispatch at 7:11 p.m. Officer Cunningham stated emergency services (EMS) were attending to Claimant when he arrived, and Claimant was slightly unresponsive. Officer Cunningham testified he overheard Claimant

[2] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (6th ed.). All references are based upon the sixth edition of the *Guides* unless otherwise noted.

inform EMS he had consumed two beers. Officer Cunningham said he smelled alcohol on Claimant's breath, and he also noted three opened beer cans lying in the ditch next to Claimant's vehicle. Lucas Wagner, a trooper with the Kansas Highway Patrol (KHP), arrived on the scene shortly thereafter. Trooper Wagner noted an odor of alcohol in Claimant's vehicle and beer cans lying on the snow nearby. Trooper Wagner and Officer Cunningham both agreed a blood draw was necessary to test for alcohol based on probable cause as well as standard KHP protocol for injury accidents. Trooper Wagner directed Officer Cunningham to obtain Claimant's blood sample.

Claimant was taken via ambulance to Wilson County Hospital, and Officer Cunningham followed in his patrol vehicle. Officer Cunningham stated he informed medical personnel at the hospital he needed a blood draw and provided a kit issued by the Kansas Bureau of Investigation (KBI). Officer Cunningham testified he witnessed the blood draw and preserved the blood sample following the instructions provided by the kit. Officer Cunningham took custody of the blood sample and sent it to KBI for testing the following day.

Officer Cunningham testified he provided Claimant with a copy of a consent advisory document, the DC-70, while at the hospital. Officer Cunningham explained he attempted to read the DC-70 and hand it to Claimant in compliance with state law, but Claimant's emergency transfer to Wichita via air ambulance prevented him from doing so. Instead, Officer Cunningham placed the DC-70 with Claimant's possessions.

Sherri Sisco, forensic scientist of toxicology for KBI, testified she tested Claimant's blood sample upon its receipt at KBI. Ms. Sisco stated all necessary seals, initials, and dates were properly located on the sample. After testing, Claimant's blood alcohol level was found to be .05 grams per 100 milliliters of blood, with a testing confidence level of 99.7 percent.

Claimant testified his father was contacted by Steve Laverty, Respondent's human resources manager, the day after the accident. It was reported Mr. Laverty indicated Claimant would have a job whenever he recovered from his injuries. Claimant was employed by Respondent for 90 days following the accident before he was terminated in April 2018. Claimant indicated he was still undergoing medical treatment at the time of his termination. Claimant was initially released without restrictions on July 1, 2018, but did not speak with Respondent about returning to work. Claimant underwent another surgery on October 29, 2018, and was under temporary restrictions. Claimant testified while he spoke with Respondent about FMLA, he did not mention workers compensation benefits. Respondent received a letter in November 2018 from Claimant's attorney providing notice of a workers compensation claim. Respondent claims the attorney's letter was its first notice claimant was alleging his injuries were work-related.

Claimant underwent extensive medical treatment for his injuries. Dr. Pedro Murati examined Claimant on April 24, 2019, per Claimant's counsel's request. He reviewed

Claimant's medical records, history, and performed a physical examination. He did not issue restrictions per Claimant's request. He opined Claimant would require future medical treatment, including physical therapy and medications. Using the AMA *Guides*, Dr. Murati determined claimant sustained a 41 percent functional impairment to the body as a whole.

PRINCIPLES OF LAW AND ANALYSIS

1. Timely notice was not given by Claimant.

K.S.A. 44-520 states, in part:

> (a) (1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:
>
> (A) 20 calendar days from the date of accident or the date of injury by repetitive trauma;
>
> . . .
>
> Notice may be given orally or in writing.
>
> . . .
>
> (a) (4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.
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> (b) The notice required by subsection (a) shall be waived if the employee proves that: (1) The employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.

The ALJ found:

> The reported statements of Steve Laverty, a representative of the Respondent said to Claimant's father the day after it occurred establishes actual knowledge of the accident and injury. In candor, Respondent may not have made the connection that the accident may have workers compensation ramifications, but that awareness does not negate the actual notice.[3]

[3] ALJ Award at 21-22.

The Board disagrees with the ALJ's finding regarding notice. K.S.A. 44-520(a)(4) requires the notice given by Claimant must make clear his intention of claiming benefits under the Act. There is no dispute Respondent had knowledge of the car accident the day after it occurred. There is no evidence, however, Claimant communicated to Respondent he intended to pursue benefits under the Act, or suffered a work-related injury, until Respondent received Claimant's letter from his attorney in November 2018 providing notice of a workers compensation claim. Claimant admitted while receiving his medical treatment he discussed FMLA with Respondent, but did not request any benefits under the Act. This time period exceeds the twenty-day notice requirement.

The Board previously held knowledge of a medical condition or accident is insufficient to satisfy the "actual knowledge of the injury" requirement of timely notice.[4] Claimant was off work and receiving medical treatment from the date of the wreck. No requests for benefits were made by Claimant until November 2018. Respondent has the duty to provide medical treatment reasonably necessary to cure or relieve an injured worker from the effects of the injury.[5] That requirement allows Respondent to direct and control medical treatment. Claimant's failure to request any benefits under the Act until November 2018 left Respondent without sufficient notice of his intent to pursue benefits and denied Respondent the opportunity to direct and control the medical treatment Claimant was receiving.

2. Claimant's claim is barred by the "going and coming" defense of K.S.A. 44-508(3)(B).

K.S.A. 44-508(3)(B) states:

> The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises owned or under the exclusive control of the employer or on the only available route to or from work that is a route involving a special risk or hazard connected with the nature of the employment, that is not a risk or hazard to which the general public is exposed and that is a route not used by the public except in dealings with the employer. An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency.

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[4] See *Hickman v. Medicalodges, Inc.*, No. 1,075,418, 2016 WL 5886189 (Kan. WCAB Sept. 12, 2016).

[5] K.S.A. 44-510h(a).

The going and coming rule sets forth the longstanding principle employees are subject to the same risks as any other commuter with no causal relationship to work when traveling to and from work.[6] Each claim should be evaluated on a case by case basis.[7]

The ALJ found Claimant to be an employee of Respondent on January 16, 2018, but was barred from benefits by the going and coming rule. The ALJ found traveling to Fredonia to be a regular component of Claimant's job.[8] The Board agrees with the ALJ's analysis and conclusions. The evidence supports his conclusion Claimant is barred from benefits by the going and coming rule in K.S.A. 44-508(B).

The cases cited by Claimant in support of his position he falls under the special purpose trip exception all deal with workers who were asked to travel to locations unrelated to their main work location. Claimant was traveling to Respondent's main office as he had done in the past. It was a routine trip to the office for which he would receive no mileage reimbursement as was the policy between the parties. Claimant was in his own vehicle, not under the control of Respondent and doing nothing to further Respondent's business. Claimant does not fall under the special purpose trip exception to the going and coming rule.

3. Even if the going and coming rule did not apply because Claimant was making a special purpose trip, Claimant's claim is barred by the deviation defense because his deviation was so substantial he abandoned any business purposes.

Compensation is denied where a major deviation from the business purpose occurs and Claimant abandoned any business purpose, even if the deviation has ceased and the employee is returning to the business route or purpose.[9] In finding Claimant's request for benefits is barred by the deviation rule, the ALJ found the cases relied upon by Claimant to avoid the deviation defense were distinguishable:

> These cited cases all occurred in vehicles owned by the respondents and assigned to the employee, making them in effect 'mobile workplaces.' This destination appears relevant to at least some degree and is not present in the instant case.[10]

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[6] See *Sumner v. Meier's Ready Mix, Inc.*, 282 Kan. 283, 289, 144 P.3d 668 (2006).

[7] See *Messenger v. Sage Drilling*, 9 Kan. App. 2d 435, 438, *rev. denied* 235 Kan. 2d 1042 (1984).

[8] ALJ Award at 11.

[9] See *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

[10] ALJ Award at 13.

Claimant left Respondent's main office and traveled to a hardware store to shop for personal items. From there, he traveled to the Fredonia golf clubhouse he frequented to watch basketball. It was located close to his home. He admitted no business activity occurred after he left Respondent's main office earlier that afternoon. The Board finds the evidence supports the ALJ's finding the deviation rule bars Claimant from benefits.

4. Addressing issues regarding admissibility of the blood alcohol test, denial of benefits due to the alcohol defense pursuant to K.S.A. 44-501(b)(1), overpayment of TTD after April 24, 2019, and constitutionality of the AMA *Guides*, 6th Edition are moot.

Based on the rulings above regarding notice, the going and coming rule, and deviation, Claimant's claim for compensation is denied, rendering it unnecessary to address the issues listed above because they are moot.

5. Claimant is not entitled to penalties for unpaid medical bills.

Civil penalties pursuant to K.S.A. 44-512a may be payable when any compensation awarded is not paid when due. To maintain a claim for penalties against the employer and insurance carrier, the employee must serve upon the employer or carrier and its attorney of record by personal service or registered mail a written demand setting forth with particularity the compensation deemed to be past due and unpaid, and payment of such demand must be refused or not made within twenty days from the date of service of the demand. The ALJ found the bills were paid in a timely manner once they were submitted in compliance with K.A.R. 51-9-7, which requires the use of the CMS 1500 billing form. The Board agrees with the ALJ's conclusion.

Claimant argues bills submitted and not paid within twenty days automatically impose penalties. Claimant also argues Respondent is trying to implement an excuse defense into the clear and unambiguous language of the statute. The 2017 Schedule of Medical Fees requires billing must be submitted using the CMS 1500 form or an equivalent form containing the same information. K.S.A. 44-512a(a) states compensation, including medical compensation, must be paid when due. Respondent argues it is not attempting to create an excuse defense within the statute. Further, Respondent argues outstanding medical bills do not become due until they are received with the required CMS 1500 or equivalent form. Once the bills were submitted with the CMS 1500, they were paid within twenty days.

The Board addressed this issue in *Wright v. Lies Ready Mix and Paving.*[11] In that claim, the Board held when Respondent promptly paid bills upon receipt of the proper

[11] *Wright v. Lies Ready Mix and Paving*, No. 237,557, 1999 WL 1113627 (Kan. WCAB Nov. 18, 1999). "Any billing or charge which is not in accordance with the fee schedule is unlawful, void, and unenforceable."

documentation required by the Fee Schedule, no penalties were due. The documents submitted in Exhibit A.1 at the December 12, 2018, preliminary hearing included medical records, wage information, medical bills, and insurance notifications. The twenty-day demand sent by Claimant's attorney on December 21, 2018, sought payment of the medical bills contained in Exhibit A.1. None of the medical bills contained in Exhibit A.1 were submitted on CMS 1500 forms or their equivalent. This, coupled with the lack of particularity regarding the medical bills believed to be past due and owing contained on the twenty-day demand sent by Claimant, fails to meet the requirement contained in K.S.A. 44-512a(a) requiring the notice to "set forth with particularity the items of disability and medical compensation claimed to be unpaid and past due." The Application for Penalties filed by Claimant on March 29, 2019, also did not list with particularity the medical bills claimed by Claimant to be unpaid.

Respondent's Exhibit B.5 to the regular hearing reveals the submitted bills on CMS 1500 forms were more often than not paid the day after receipt. The longest delay in payment after receipt of a bill on a CMS 1500 form was fifteen days (Med-Trans Corp. d/b/a Eagle Med). All medical bills were paid on or before October 3, 2019.

The ALJ denied Claimant's request for penalties on all medical bills except for Dr. Gillespie's $53 bill for which a $25 penalty was assessed. In so doing, the ALJ found:

> Since this court has been willing to accept the proffers made by Respondent in their submission letter and those made on Exhibit 5, the Court extends the same willingness to accept the proffers of Claimant and accept somewhere in the exhibits there is a bill from Dr. Gillespie that was properly presented for $53 and Respondent has neglected to timely pay.[12]

The Board searched Exhibit A.1 to the December 12, 2018, preliminary hearing, as well as Claimant's Exhibit A.5 and Respondent's Exhibit B.5 to the regular hearing, and no bill from Dr. Gillespie was located. Moreover, Respondent's Exhibit B.5 was offered by Respondent and accepted by the Court without objections from Claimant or the Fund. The ALJ was not obligated to accept Claimant's proffers regarding Dr. Gillespie's bill.

CONCLUSION

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified. Claimant's request for benefits is barred for failure to provide timely notice in addition to the ALJ's findings regarding the going and coming rule and deviation defense. The Award of the ALJ is also modified to deny penalties to Claimant of $25 for the medical bill of Dr. Gillespie.

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[12] ALJ Award at 24.

AWARD

WHEREFORE, it is the finding, decision and order of the Board the Award of Administrative Law Judge Steven M. Roth dated March 17, 2020, is modified in part. Claimant is barred from recovery for lack of timely notice. Claimant's request for penalties is denied. The remaining findings and orders contained in the Award are affirmed.

IT IS SO ORDERED.

Dated this _____ day of July, 2020.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Terry Torline, Attorney for Claimant
Meredith Moser, Attorney for Respondent and its Insurance Carrier
Matthew Bergmann, Attorney for Kansas Workers Compensation Fund
Hon. Steven M. Roth, Administrative Law Judge